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No. 89-1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

vs.

MARY R. WELLS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. THE *GARMON* PRE-EMPTION ISSUE ...	1
II. THE SECTION 301 PRE-EMPTION ISSUE .	5
III. THE ERISA PRE-EMPTION ISSUE	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	PAGE
Allis-Chalmers Corp. v. *Lueck*, 471 U.S. 202 (1985)	5, 6
Balock v. *Mars Electronics Int'l, Inc.*, No. 89-1290 (E.D. Pa. 1990)	9
Berlin v. *Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988)	8
Blau v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir.), cert. denied, 474 U.S. 865 (1985)	9
CBS Inc. v. *Berda*, No. 89-589 (cert. denied Jan. 22, 1990)	7
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987)	7
Darden v. *United States Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987)	6
DeLapp v. *Continental Can Co.*, 868 F.2d 1073 (9th Cir. 1989)	6
Drennen v. *General Motors Corp.*, No. C-1-88-515 (S.D. Ohio 1990)	9
First Nat'l Maintenance Corp. v. *NLRB*, 452 U.S. 666 (1981)	3
Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1 (1987)	9
Hagy, Harrington & Marsh, 74 NLRB 1455 (1947)	3
Kolentus v. *Avco Corp.*, 798 F.2d 949 (7th Cir. 1986), cert. denied, 479 U.S. 1032 (1987)	2
Lingle v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988)	7
Massachusetts v. *Morash*, 109 S. Ct. 1668 (1989)	10

Medo Photo Supply Corp. v. *NLRB*, 321 U.S. 678 (1944) 5

NLRB v. *Katz*, 369 U.S. 736 (1962) 4

Overby v. *Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1989) 2

Pane v. *RCA Corp.*, 868 F.2d 631 (1989) 8, 9

Parker v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 109 S. Ct. 2066 (1989) .. 2

Scott v. *Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985) 9

Serrano v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) 2

Sly v. *P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983) 9

Windfield v. *Groen Div., Dover Corp.*, 890 F.2d 764 (1989) 2

Young v. *Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), cert. denied, 109 S. Ct. 529 (1988) .. 8, 9

STATUTES AND REGULATIONS:

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) 4, 5

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ..... 5, 6

29 C.F.R. § 2510.3-1(a)(3) 2

I. THE *GARMON* PRE-EMPTION ISSUE

We demonstrated in the petition (at 8-15) that (a) the Fifth Circuit effectively abolished the "arguably prohibited" branch of the *Garmon* pre-emption doctrine and (b) improperly decided that the future employment eligibility of existing employees is not a mandatory subject of bargaining. Not surprisingly, respondents make no effort to defend these indefensible rulings. Rather, as to the former, they attempt to deny the plain holding of the court of appeals, and as to the latter, they simply misconstrue the petition as "tacitly admitt[ing] that the conduct in issue concerned a non-mandatory subject of bargaining." Br. in Opp. 11.

A. Contrary to respondents' irrelevant and repetitive references to burdens of proof (Br. in Opp. 11-14), the court of appeals was willing to assume that GM's conduct *was* arguably prohibited by the NLRA (Pet. App. 9a). The court below nonetheless held that, after this Court's decision in *Davis*, that was no longer a basis for *Garmon* pre-emption (*ibid.*; emphasis in original):

> By its own cast, GM's argument concerning its "circumvention" of union representatives goes only to show that its conduct was arguably *prohibited* by the Board; hence, its claim could not reasonably be *upheld* by the Board.

The Fifth Circuit's holding could not be clearer. It did not hold, as respondents would have it, that GM merely "failed to meet its burden" of proving that its conduct was arguably prohibited by the NLRA. Instead, it held that an argument that a party's own conduct was arguably prohibited is not a claim that could be "upheld" by the Board and is therefore not a ground for pre-emption.

The court of appeals' decision is based on a dangerous and erroneous construction of *Davis* and directly conflicts with decisions of several other circuits that have continued properly to apply the "arguably prohibited" branch of

Garmon after *Davis*. See, *e.g.*, *Overby* v. *Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1989); *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 109 S. Ct. 2066 (1989); *Kolentus* v. *Avco Corp.*, 798 F.2d 949 (7th Cir. 1986), cert. denied, 479 U.S. 1032 (1987).[1]

Respondents also assert (Br. in Opp. 14-17) that even if the court of appeals had held that claims relating to conduct arguably prohibited by the NLRA would ordinarily be pre-empted, their claims would fall within two exceptions to *Garmon* pre-emption. But neither of the courts below discussed those exceptions, much less found them applicable to the facts of this case. In any event, as we pointed out in the petition, if respondents' fraud and misrepresentation allegations were true, they would amount to claims that the company bypassed the union and bargained directly with the employees and that it persuaded the union to accept the VTEP plan by misrepresenting its consequences. Respondents' state law claims thus seek to regulate the identical conduct that Congress reserved for the Board. And such conduct can hardly be considered of "peripheral concern" to the federal statute. *Parker* v. *Connors Steel Co.*, 855 F.2d at 1518; *Serrano* v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1287 (6th Cir. 1986).[2]

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[1] The Fifth Circuit's decision in *Windfield* v. *Groen Div., Dover Corp.*, 890 F.2d 764 (1989), does not diminish the import of this case. *Windfield* did not even cite *Davis* or the decision below. Moreover, *Windfield* relied on entirely separate grounds for reaching the questionable conclusion that state law claims relating to alleged misrepresentations made in the heat of a union election campaign were not pre-empted by the NLRA.

[2] In light of respondents' unfounded contention (Br. in Opp. 16-17) that the issues in this case are merely of "peripheral concern" to the NLRA and thus do not unduly interfere with the Board's prerogatives, the Court may wish to request the views of the Solicitor General on this issue, as well as on the issue of whether the VTEP plan is an employee benefit plan within the meaning of ERISA. See 29 C.F.R. § 2510.3-1(a)(3) ("the effect of section 3(1)(B) of [ERISA] is to include within the definition of 'welfare plan' those plans which provide * * * severance benefits").

B. Respondents argue that the court of appeals correctly held that their claims were not pre-empted because the future employment eligibility of employees about to be voluntarily terminated is not a mandatory subject of bargaining. Br. in Opp. 10-11.[3] As we pointed out in the petition (at 12-15), however, that far-reaching conclusion is neither correct nor a proper one for the court of appeals to have reached without guidance from the NLRB. Although it may be true that employers do not have to bargain over the eligibility of entirely *new* applicants for employment—people who never worked for the company—it is at least widely assumed that employers must bargain over the reemployment rights of employees being laid off or terminated. See, *e.g.*, *Hagy, Harrington & Marsh*, 74 NLRB 1455, 1478 (1947). But now the law in the Fifth Circuit is that employers no longer have to bargain over the reemployment rights of employees being terminated. The court of appeals' holding is anomalous and presents a serious threat to settled employer-union relations.[4]

Respondents seek to prevent review of this important pre-emption issue by arguing (Br. in Opp. 11) that no bargaining obligation could have been triggered in the absence of a formal bargaining demand. But even if it were

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[3] Respondents attempt to construe the lower courts' decision that future eligibility is not a mandatory subject of bargaining as holding only that future eligibility was not a subject of discussion at the bargaining table when the VTEP was discussed. Br. in Opp. 6, 10. But those are clearly quite separate issues.

[4] Respondents repeatedly try to equate themselves with truly new applicants who have never worked for GM. Certainly GM and the union could agree to a VTEP contract under which voluntarily terminated employees would be treated the same as new applicants. But prior to the decision below, it was thought that an employer would be required to bargain with the union over the impact of the terminations on reemployment rights. See *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 677 n.15 (1981). The import of the court of appeals' decision is that GM and other employers no longer have an obligation even to bargain over reemployment rights once they have decided to terminate an employee.

true that there was no bargaining demand,[5] there would be two problems with respondents' argument. First, as the court of appeals acknowledged (Pet. App. 9a n.8), if future eligibility were a mandatory subject of bargaining, GM's announcement that it would not consider VTEP recipients for reemployment was arguably a unilateral change in employment terms and thus arguably a *per se* violation of Section 8(a)(5). *NLRB* v. *Katz*, 369 U.S. 736 (1962). As respondents state in their Brief in Opposition (at 10 n.8), they claimed below that employees who left GM voluntarily "had always been allowed to reapply for future job openings." GM responded that ineligibility for future employment was part of the negotiated VTEP deal and therefore refused to allow respondents to reapply. Clearly, if respondents' allegations were true, GM unilaterally changed the reemployment rule. Even if there had been no demand for bargaining, such a unilateral change would be arguably prohibited by Section 8(a)(5).

In addition, respondents assert that GM induced them to accept the VTEP by offering them something it did

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[5] As we noted in the petition (at 15 n.3) the court of appeals acknowledged that the union did raise the issue of employment eligibility at the bargaining table. Respondents suggest (Br. in Opp. 3-6) that we have misstated the court of appeals' account of the facts, but the court's statement speaks for itself (Pet. App. 3a):

> GM's version of the facts contradicts that of the plaintiffs and their union in every important respect. GM contends that the parties raised the issue of "rehire rights" in bargaining over the VTEP and that GM officials specifically told union representatives that employees opting for VTEP would not be eligible for rehire. Plaintiffs and their union claim that the representatives asked about future eligibility and were told that would be "no problem."

Whichever version one accepts, the issue did come up. Even if, in light of that alleged representation that reemployment would be "no problem," there was no formal demand for bargaining on the issue, GM's alleged conduct would constitute a material misrepresentation at the bargaining table in violation of Section 8(a)(5).

not offer through the union at the bargaining table. That certainly amounts to a claim that GM bargained directly with employees in violation of Section 8(a)(5), without regard to whether the union ever demanded to bargain over the issue. *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 684 (1944). The court of appeals did not hold that this part of GM's argument was in any way foreclosed; instead, it erroneously held that after *Davis*, GM could no longer base its defense of pre-emption on a claim that its own conduct was arguably prohibited by the NLRA.

II. THE SECTION 301 PRE-EMPTION ISSUE

As we explained in the petition (at 15-24), respondents' state law claims are "inextricably intertwined with consideration of the terms of the [VTEP] labor contract." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 213 (1985).[6] The dispute in this case concerns the consequences flowing from the VTEP Agreement, and the express and implied rights of the parties under that negotiated collective bargaining agreement. The court below made the same error that the state court made in *Lueck*: it "evidently assumed that the only obligations the parties assumed by contract are those expressly recited in the agreement." 471 U.S. at 214. That assumption "is not one that state law may make." *Id.* at 215. Respondents completely fail to address this critical point.[7]

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[6] Respondents (Br. in Opp. 6) accuse GM of making a "gross misstatement of fact" by stating that "it is beyond dispute that respondents' claims owe their existence to the VTEP Agreement." Pet. 19. GM stands by that statement; clearly had there been no VTEP there would have been no representations about its consequences and thus no possible claims of misrepresentation.

[7] Respondents ask (Br. in Opp. 20) what provisions of the VTEP might be construed to relate to their claims. Certainly paragraph 6 of the Application Procedure (Pet. App. 42a-43a) and paragraph 1 of the Repayment provision (*id.* at 43a) might be of significance.

(Footnote continued on following page)

Moreover, respondents' claim that GM misrepresented the consequences of accepting VTEP benefits unquestionably requires interpretation of the VTEP Agreement to see if the alleged representations were untrue. Even as they argue that their claims do not require any interpretation of the VTEP Agreement, respondents go to great lengths (Br. in Opp. 1 n.1) to convince the Court that their interpretation of the term "rehire rights" is correct and critical to an understanding of this case. But the very fact that respondents have to make that argument about the meaning of the VTEP Agreement is the best evidence that "any attempt to assess liability [on respondents' state-law claims] * * * inevitably will involve contract interpretation." *Lueck*, 471 U.S. at 218.

Notwithstanding respondents' assertion to the contrary, the courts of appeals are in direct conflict over whether extracontractual promises made to bargaining unit employees may be enforced under state law. The Ninth and Eleventh Circuits have held that such claims are pre-empted by Section 301. *DeLapp* v. *Continental Can Co.*, 868 F.2d 1073, 1074-1076 (9th Cir. 1989); *Darden* v. *United States Steel Corp.*, 830 F.2d 1116, 1119-1120 (11th Cir. 1987). The Fifth Circuit has held to the contrary. Plainly, the differences between these courts are the results of disagreements over law (*i.e.*, the significance of whether the plaintiffs were employees and members of the bargaining unit when the allegedly false statements were made) rather than fact.[8]

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[7] *continued*
But even if these express provisions were not included in the VTEP Agreement, the court of appeals nonetheless improperly "assumed that the contract contained no implied terms bearing on the issue of reemployment rights." *Lueck*, 471 U.S. at 214.

[8] As we pointed out in the petition (at 21-23), the Third, Eighth and Eleventh Circuits have held that claims relating to *pre-employment* promises are not pre-empted by Section 301, but the Ninth

(Footnote continued on following page)

Even though respondents grudgingly concede (Br. in Opp. 22) that "some of the cases have reached seemingly different results on fact patterns that were similar in some respects," they suggest (*ibid.*) that the conflict among the courts of appeals has been resolved by *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). But that decision did not address pre-emption of claims arising from extracontractual promises, and in any event the conflict between the Fifth and the Ninth Circuits post-dates *Lingle*. Review by this Court is needed to resolve that conflict.

III. THE ERISA PRE-EMPTION ISSUE

Perhaps the most troubling aspect of the court of appeals' decision is its conclusion that the VTEP severance benefit plan was not an employee benefit plan under ERISA. As we noted in the petition (at 26), that conclusion not only means that state law claims relating to severance plans like the VTEP are not pre-empted. It also means that the entire regulatory framework of ERISA is inapplicable to such plans. Such a far-reaching decision, in clear conflict with those of other courts of appeals, requires this Court's review.

Respondents give short shrift to the important ERISA pre-emption issue presented by this case and rather lamely attempt to refute the fact that the Third and the Fifth Circuits are in clear conflict. The Third Circuit has held

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[6] *continued*
Circuit has reached the opposite conclusion. This Court recently denied a petition for certiorari seeking review of the Third Circuit's decision on that issue. *CBS, Inc.* v. *Berda*, No. 89-589 (cert. denied Jan. 22, 1990). The pre-emption issue relating to pre-employment promises may be regarded as having been settled by this Court's decision in *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987). But there has been no resolution of the post-*Caterpillar* conflict among the Fifth, Ninth and Eleventh Circuits on the very different issue relating to extracontractual promises made to employees who were members of the bargaining unit at the time of the alleged promises.

that a severance program involving a limited number of employees and a single anticipated set of job terminations was an employee benefit plan under ERISA. *Pane* v. *RCA Corp.*, 868 F.2d 631 (1989). The Fifth Circuit in this case held that a similar severance plan was not covered by ERISA. The conflict could hardly be sharper.

Respondents attempt to distinguish *Pane* on the ground that the Third Circuit found that the RCA plan required an administrative scheme, while the Fifth Circuit found that GM's VTEP plan did not require such a scheme. Br. in Opp. 26. But that merely restates the fact that the two courts reached opposite conclusions of law: faced with similar facts (company severance programs adopted to deal with a single set of anticipated job terminations), the Third Circuit held that the plan involved an "administrative scheme" and was subject to ERISA, and the Fifth Circuit held that the plan did not involve an "administrative scheme" and was not subject to ERISA. Respondents offer no reason to believe that the Third Circuit would have found ERISA inapplicable in this case.

Other courts that have considered the issue have deemed similar severance programs to be governed by ERISA. For example, in *Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), the employer adopted a special one-time severance program in order to reduce its number of managers. The program was available only to a limited number of employees who elected to retire during a set two-month period, and provided special severance benefits to be paid over a one-year period.[9] The Sixth Circuit held that ERISA's fiduciary obligation applied to the plan. *Id.* at 1162. Similarly, in *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), cert. denied, 109 S. Ct. 529 (1988), the employer had a standing severance allowance

[9] In this case GM employees could have their VTEP benefits paid over two years. Pet. App. 42a.

policy that "management could elect to 'apply to a particular employee-reduction situation.' " 849 F.2d at 1040-1041.[10] The Seventh Circuit held that the severance program was an ERISA benefit plan, even as applied to a particular set of job terminations caused by the sale of one plant. *Id.* at 1045.

By contrast, the Fifth Circuit relied on *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987), in holding that the VTEP plan was not governed by ERISA. But *Berlin*, *Young* and *Pane* all reached the opposite conclusion after the decision in *Coyne*. In fact, the Third Circuit in *Pane* expressly relied on *Coyne*. 868 F.2d at 635. See also *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-1504 (9th Cir. 1985); *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir.), cert. denied, 474 U.S. 865 (1985); *Sly* v. *P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983) (pre-*Coyne* decisions holding that similar severance benefit programs were subject to ERISA).

The district courts are in accord. Indeed, only a few weeks ago, one court held that a GM VTEP plan adopted to deal with a single plant closing was governed by ERISA. *Drennen* v. *General Motors Corp.*, No. C-1-88-515 (S.D. Ohio 1990). See also *Balock* v. *Mars Electronics Int'l, Inc.*, No. 89-1290 (E.D. Pa. 1990) (voluntary severance benefit plan offered as part of a corporate reorganization is an ERISA benefit plan).[11]

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[10] This was much like GM's VTEP, which was negotiated between the union and GM elsewhere and then applied to the Clinton plant by subsequent decision. Pet. App. 26a-27a.

[11] Respondents repeat (Br. in Opp. 26 n.13) the district court's conclusion that the VTEP plan was not covered by ERISA because "the purpose of GM in instituting VTEP was not to provide its employees with benefits under the Act but was instead to reduce its work force * * *." Pet. App. 40a. Obviously, employers provide employee benefits in all cases to serve their business purposes. If employee pension or welfare benefit plans are not covered by ERISA whenever the employer adopts or agrees to them to serve its own economic interests, ERISA would be an empty statute indeed.

As this Court has recently noted, "plans to pay employees severance benefits, which are payable * * * upon termination of employment, are employee welfare benefit plans within the meaning of [ERISA]." *Massachusetts* v. *Morash*, 109 S. Ct. 1668, 1673 (1989). The court of appeals' contrary conclusion requires the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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